

of its permanent capital. Further, a national bank may not declare a dividend in excess of undivided profits.

(b) *Preferred stock.* The provisions of 12 U.S.C. 56 do not apply to dividends on preferred stock. However, if the undivided profits of the national bank are not sufficient to cover a proposed dividend on preferred stock, the proposed dividend constitutes a reduction in capital subject to 12 U.S.C. 59 and § 5.46.

§ 5.64 Earnings limitation under 12 U.S.C. 60.

(a) *Definitions.* As used in this section, the term “current year” means the calendar year in which a national bank declared, or proposes to declare, a dividend. The term “current year minus one” means the year immediately preceding the current year. The term “current year minus two” means the year that is two years prior to the current year. The term “current year minus three” means the year that is three years prior to the current year. The term “current year minus four” means the year that is four years prior to the current year.

(b) *Dividends from undivided profits.* Subject to 12 U.S.C. 56 and this subpart, the directors of a national bank may declare and pay dividends of so much of the undivided profits as they judge to be expedient.

(c) *Earnings limitations under 12 U.S.C. 60—(1) General rule.* For purposes of 12 U.S.C. 60, unless approved by the OCC in accordance with paragraph (c)(3) of this section, a national bank may not declare a dividend if the total amount of all dividends (common and preferred), including the proposed dividend, declared by the national bank in any current year exceeds the total of the national bank’s net income for the current year to date, combined with its retained net income of current year minus one and current year minus two, less the sum of any transfers required by the OCC and any transfers required to be made to a fund for the retirement of any preferred stock.

(2) *Excess dividends in prior periods.* (i) If in current year minus one or current year minus two the bank declared dividends in excess of that year’s net income, the excess shall not reduce retained net income for the three-year

period specified in paragraph (c)(1) of this section, provided that the amount of excess dividends can be offset by retained net income in current year minus three or current year minus four. If the bank declared dividends in excess of net income in current year minus one, the excess is offset by retained net income in current year minus three and then by retained net income in current year minus two. If the bank declared dividends in excess of net income in current year minus two, the excess is first offset by retained net income in current year minus four and then by retained net income in current year minus three.

(ii) If the bank’s retained net income in current year minus three and current year minus four was insufficient to offset the full amount of the excess dividends declared, as calculated in accordance with paragraph (c)(2)(i) of this section, then the amount that is not offset will reduce the retained net income available to pay dividends in the current year.

(iii) The calculation in paragraph (c)(2) of this section shall apply only to retained net loss that results from dividends declared in excess of a single year’s net income and does not apply to other types of current earnings deficits.

(3) *Prior approval required.* A national bank may declare a dividend in excess of the amount described in paragraph (c) of this section, provided that the dividend is approved by the OCC. A national bank shall submit a request for prior approval of a dividend under 12 U.S.C. 60 to the appropriate district office.

(d) *Surplus surplus.* Any amount in capital surplus in excess of capital stock (referred to as “surplus surplus”) may be transferred to undivided profits and available as dividends, provided:

(1) The bank can demonstrate that the amount came from earnings in prior periods, excluding the effect of any stock dividend; and

(2) The board of directors of the bank approves the transfer of the amount from capital surplus to undivided profits.

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